IN THE SUPREME COURT OF MISSOURI

SC93792

SCOTTSDALE INSURANCE COMPANY and WELLS TRUCKING, INC.,
Plaintiffs-Appellants,

v.

ADDISON INSURANCE COMPANY and UNITED FIRE & CASUALTY Co.,
Defendants-Respondents.

Appeal from the Circuit Court of Linn County
Case No. 10LI-CC00022
The Honorable Gary E. Ravens

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This action is one involving the question of whether, under Missouri law, an excess insurance carrier may sue a primary insurance carrier for damages for bad faith failure to settle a claim under a theory of equitable subrogation against their mutual insured, where the excess insurance carrier makes a voluntary payment within its layer of insurance to settle a claim. Hence, this action involves the construction of Missouri law regarding the tort of bad faith failure to settle. The Missouri Court of Appeals for the Western District of Missouri issued an Opinion in this case dated October 1, 2013. Upon a timely-filed Motion to Transfer filed with the Supreme Court of Missouri on November 13, 2013, the Supreme Court of Missouri, sitting en banc, ordered transfer of this case to the Supreme Court of Missouri on February 4, 2014. Therefore, the Supreme Court of Missouri has jurisdiction over this case under Article V, Section 9 of the Missouri Constitution. The Missouri Supreme Court's review of this case is as though on original appeal. Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. 1985) (en banc).

STATEMENT OF FACTS

Addison Insurance Company and United Fire & Casualty Company[1] object to Scottsdale's Section II entitled "Introduction" because such comments are not allowed under Mo. R. Civ. P. 84.04 and because Scottsdale's "Introduction" contains no citations to the record which would allow it to be considered part of the Statement of Facts under Mo. R. Civ. P. 84.04(c). Addison also objects to Scottsdale's "Introduction" as unduly argumentative.

This is an action for bad faith failure to settle filed by an excess insurance carrier against a primary insurance carrier which resulted in summary judgment in favor of the defendant primary carrier. (LF 1386-91). Appellants Scottsdale and Wells Trucking, Inc. seek a reversal of the trial court's judgment in favor of defendants Addison Insurance Company and United Fire and Casualty Company.

A. The Underlying Childress v. Wells Trucking Lawsuit

Underlying this claim by an excess insurance carrier against a primary insurance carrier is a wrongful death claim arising out of a two-vehicle accident which occurred on August 27, 2007 in Knox County, Missouri which resulted in

[1] For the sake of convenience, Respondents United Fire & Casualty Company and Addison Insurance Company are collectively referred to throughout this brief as "Addison."

the death of motorist Scott Childress. (LF 18, 268, 652). The insured driver, Eric Probst, was operating a truck and trailer owned by Wells Trucking, Inc. at the time of the accident. (LF 1155). Fault for the accident was disputed and was the subject of expert testimony offered by multiple accident reconstructionists. (LF 686-92, 703-09, 944-64, 969-70). An accident reconstruction report prepared by the Missouri State Highway Patrol indicated that the accident occurred due to a combination of several factors, including Childress' failure to yield to Probst's right of way, Probst's speed, and Probst's crossing of the centerline. (LF 944-64).

Addison Insurance Company, a wholly-owned subsidiary of United Fire & Casualty Company, issued commercial auto policy number 60346435 to Wells Trucking, Inc. which was in effect at the time of the accident. (LF 16, 42-109, 239-41, 1151). The Addison policy contained a $1,000,000 liability limit. (LF 53). On March 3, 2008, Addison received a letter that the Childress family was represented with respect to their wrongful death claim. (LF 902).

On March 14, 2008, Addison retained attorney Mike Baker to defend Wells Trucking, Inc. and its driver, Probst, in the anticipated wrongful death claim without reservation. (LF 900, 965, 967, 1155, 1177). On April 1, 2008, Addison, via Baker, made a $50,000 settlement offer on the wrongful death claim based upon Addison's evaluation that its insured likely had 20% fault for the accident.

(LF 639-40, 791). The $50,000 offer was "just a place to start negotiations." (App. at A46). The demand was rejected. (LF 648-49, 892, 969, 976).

On April 14, 2008, the attorney representing the Childress family sent a letter to Baker demanding the $1,000,000 liability limit on the Addison policy or the limits of all insurance policies available to indemnify Probst and Wells Trucking, whichever was greater. (LF 652-70). On May 5, 2008, Baker wrote to counsel for the Childress family indicating that the cause of the accident was still under investigation, including the electronic data which may be available on both vehicles. (LF 675). Baker requested a thirty day extension on the $1,000,000 demand. (LF 676). Counsel for the Childress family agreed to the extension while the black box data was being recovered. (LF 885).

The accident report prepared by the Missouri Highway Patrol indicated that although Childress had pulled from a stop sign into Probst's path, Probst was speeding based upon marks left by the Probst vehicle in the roadway. (LF 944-64). Probst told Baker that he disputed the Highway Patrol's findings and that he had an accident reconstructionist who would dispute the Highway Patrol's conclusion that he was speeding. (LF 117, 888). The report of James Sneddon, Probst's accident reconstructionist, was later shared with Addison which indeed disputed the Highway Patrol's conclusions that tire marks left by the Probst vehicle were skidmarks from Probst's vehicle and that the marks indicated that Probst was

speeding. (LF 703-709). Sneddon believed the marks had been caused by another vehicle prior to the accident. (LF 707, 733). Up until August 2009, Baker considered the opinions of Sneddon to be favorable to the insureds. (App. at A74).

On May 30, 2008, the electronic control module (ECM) was collected from the Probst vehicle. (LF 884-85, 887). After efforts from various experts and the vehicle's manufacturer to collect the ECM data, Addison discovered on or about July 8, 2008 that the ECM data could not be collected from the Probst vehicle. (LF 562, 675-76, 713, 742-43, 883, 1111-12). Without the ECM data, the parties would have to rely on the opinions of accident reconstructionists regarding the speed of the Probst vehicle. (LF 742-43).

On or about July 15, 2008, counsel for the Childress family advised that the family was not interested in mediation. (LF 713, 1015). On or about August 20, 2008, Addison authorized Baker to file an Offer of Judgment in the amount of $250,000. (LF 1017-19). On August 21, 2008, counsel for the Childress family sent a letter citing the pre-judgment interest statute and demanding $1,000,000. (LF 1022-23).

On September 10, 2008, Baker learned that Wells Trucking had an umbrella policy with Scottsdale which provided excess coverage for Wells Trucking and Probst for the subject accident. (LF 110-163, 683). On September 23, 2008, Baker reported to Lisa Doyle at Scottsdale the status of the case and provided a CD-Rom

containing hundreds of pages of relevant documents and pleadings for her review. (LF 711-14). Baker produced a copy of the Scottsdale policy to the Childress family's attorney on September 29, 2008. (LF 1027-33). Baker then copied Lisa Doyle on all correspondence to United Fire reporting on the litigation. (LF 686-92, 696-97, 711-14, 716-18, 732-34, 737-39, 930-36, 1036-38). Baker also copied Doyle when Addison renewed its $250,000 offer on April 24, 2009. (LF 736).

Lisa Doyle testified that her independent evaluation throughout the case was that the decedent was 70% at fault and the insured driver was 30% at fault. (App. at A3-4). Addison had evaluated the decedent's fault as 80% and the insured driver's fault at 20%. (LF 907). Scottsdale never asked Baker for a written evaluation of the claim. (App. at A16). Scottsdale's claim file did not include Baker's estimated percentage of fault on each driver or Baker's evaluation of damages which indicated that the value of the case exceeded Addison's $1 million limit. (App. at A16). Scottsdale's claim includes no note that Baker believed the jury would award in excess of $1 million. (App. at A16-17). Scottsdale was not aware of any verdicts in the county where the wrongful death action was pending or in the state of Missouri where a wrongful death verdict exceeded $5 million. (App. at A20-21). Scottsdale set its reserve originally at $500,000. (App. at A8, LF 711-14).

One issue in the case was whether Probst's driving of the vehicle was legal under the federal motor carrier law. (LF 737-38; App.. at A47, A86-87). Addison had obtained a legal opinion that Probst's operation of the vehicle under the federal motor carrier law was legal and shared that legal opinion with Scottsdale. (LF 737-38; App. at A47, A86-87).

On January 9, 2009, Doyle wrote to Addison demanding that Addison settle the claim within Addison's policy limits. (LF 1039-40). Addison responded to Doyle by indicating that Addison was still investigating the claim. (LF 1041).

On March 19, 2009, Baker transmitted to Addison and Scottsdale another pre-judgment interest letter received from the Childress family dated March 12, 2009 again demanding the $1,000,000 limit on the Addison policy. (LF 719-20, 732-34). On April 24, 2009, Addison, through Baker, declined the $1,000,000 demand, stating that Addison's investigation indicated that the majority of the fault was with Childress, but extended an offer of $250,000 and invited further settlement discussions through mediation. (LF 735-36).

On or about May 13, 2009, attorney Tim Dollar entered his appearance on behalf of the plaintiffs in the underlying wrongful death matter. (LF 1065). Plaintiffs' $1 million demand remained open after Mr. Dollar entered his appearance for the Childress family. (LF 719-20). No new demands were made until August 25, 2009. (LF 684-85).

On August 25, 2009, Baker received a demand letter from plaintiffs for the full amount of both policies, $3,000,000. (LF 684-85). Dollar's demand letter stated that alternatively, the family would accept $1,000,000, then would consent to mediation. (LF 685). Dollar's demand letter stated that the offer shall remain open until September 15, 2009. (LF 685).

On August 31, 2009, Baker reported to Addison and Scottsdale that he had deposed the plaintiffs' accident reconstructionists and reviewed the accident simulation videos produced by those experts. (LF 686-692). Baker commented that plaintiffs' expert, Kevin Johnson, was a "very good witness," who had prepared a "very impressive simulation of the accident." (LF 687-88). Based upon the depositions of plaintiffs' experts and Baker's consultation with defendants' experts, Baker concluded that "it will be very difficult, if not next to impossible, to convince a jury that the 204 feet of tire marks left on the highway by the Probst vehicle were not 'skid marks.'" (LF 689). Baker opined that "[b]ased on the information available at this time, it is my opinion that any percentage of fault that might be assessed to Mr. Childress for the accident would be between zero and fifty percent (0-50%). I anticipate the fault of Mr. Probst between fifty and one hundred percent (50-100%)." (LF 691). Baker also told Addison and Scottsdale for the first time that, "[f]rankly, I am of the opinion that it would be difficult to obtain a verdict in this case in an amount less than One Million Dollars

($1,000,000.00)." (LF 691, App. at A74-76). Baker's August 31, 2009 report was the first time Baker expressed concern about the opinions of the defense's accident reconstructionist, Sneddon. (App. at A74).

Lisa Doyle testified that she never contacted Addison to discuss that Scottsdale believed that the claim's value exceeded $1 million. (App. at A18-19). Ms. Doyle also never called Addison to discuss Addison's evaluation of the claim. (App. at A20). Ms. Doyle admitted that Scottsdale had agreed with the comparative fault evaluation Baker had discussed with her and agreed with Baker's handling of the claim. (App. at A19-20). Scottsdale never told Baker to engage in discovery or that he should move quicker to depose the plaintiffs' accident reconstructionists. (App. at A19).

After receipt of Baker's August 31, 2009 letter, on September 4, 2009, Addison tendered its $1 million policy limit to plaintiffs and notified Scottsdale of the same. (LF 870). Addison tendered the defense of the insureds to Scottsdale. (LF 1067-68). Scottsdale increased its reserve to $1 million. (App. at A8). Scottsdale responded by stating that Addison was in bad faith and demanded that Addison continue to defend the insureds. (LF 1070-71).

On October 20, 2009, Addison and Scottsdale attended a mediation with the Childress family. (LF 867). Addison's $1 million was already on the table. (LF 1067). At the mediation, an attorney representing Scottsdale came into Addison's

caucus and asked whether Addison had any objection to Scottsdale offering the plaintiffs $750,000. (App. at A134). Addison responded that what Scottsdale would pay was not Addison's decision. (App. at A134). The Childress claim settled at mediation for a total of $2 million whereby Addison paid its limits of $1 million and Scottsdale paid $1 million. (LF 868, 1172-73, 1217). The wrongful death settlement and distribution of proceeds was approved by the court. (LF 1193). Scottsdale received, as part of the settlement, an assignment of rights from Wells Trucking under the Addison policy. (LF 868, 1172-73, 1217).

B. Facts Regarding the Present Action Filed by Scottsdale

After first prosecuting its case in federal district court for several months, Scottsdale dismissed its federal court action and filed the present action in Linn County, Missouri on July 7, 2010. (LF 1, 164-65). This case was assigned to the Honorable Gary E. Ravens. (LF 1, 1250-51, 1386-91). In their First Amended Petition, Scottsdale and its insured, Wells Trucking, sought compensatory and punitive damages for bad faith failure to settle under six different legal theories, a declaratory judgment, and their attorneys' fees. (LF 12-39).

Addison filed a motion to dismiss on December 27, 2010 arguing that Scottsdale's Petition failed to state a claim upon which relief could be granted. (LF 164-86). The trial court held that the case could proceed on Scottsdale's BFFS claims under theories of assignment and contractual subrogation, but the court

declined to rule whether the remaining counts stated a claim upon which relief could be granted. (LF 237).

Addison filed a motion for summary judgment on August 30, 2012. (LF 267-86). Pursuant to Rule 74.04(c)(2), Scottsdale had 30 days to file its Suggestions in Opposition to Defendants' Motion for Summary Judgment. (LF 267, 1250, 1376 ¶ 2, 1378 ¶ 20). Since September 29, 2012 fell on a Saturday, Scottsdale's Response and Suggestions in Opposition were due on October 1, 2012 (LF 1376 ¶ 2, 1378 ¶ 20). Scottsdale did not file its Response on or before October 1, 2012 as required by Rule 74.04(c)(2). Rather, Scottsdale filed its Response to Addison's motion for summary judgment on October 11, 2012. (LF 292).

At no time while this matter was pending before Judge Ravens did Scottsdale request additional time or move for additional time to respond to Addison's motion for summary judgment. (Tr. p. 4-7, LF 278-90). Scottsdale did not seek leave of court to file its response out of time. (Tr. p. 4). Rather, on October 2, 2012, Scottsdale "granted" itself a four-day extension to file its response to Addison's motion. (LF 287-88). Then on October 5, 2012, Scottsdale "granted" itself an additional seven days, until October 12, 2012, to file its response to Addison's motion for summary judgment. (LF 289-90). Although Addison's counsel had no objection to Scottsdale's requests for extensions, Scottsdale never presented either of the requested extensions to Judge Ravens for his consideration

or approval. (Tr. p. 4-7, LF 287-90). Judge Ravens issued an Order on November 1, 2012 declaring Scottsdale's response to be untimely pursuant to Mo.R.Civ.P. 74.04(c)(2), and thus all facts in Addison's motion were deemed admitted. (LF 1250-51). Judge Ravens instructed Addison to prepare and submit to the Court its Judgment Sustaining Motion for Summary Judgment. (LF 1250-51).

Rather than seek leave of Court to file its response to Addison's motion for summary judgment out of time, Scottsdale opted to file a "Motion for Reconsideration" and objections to the judgment proposed by Addison. (LF 1252-70). In its "Motion for Reconsideration," Scottsdale sought the court's review of its November 1, 2012 Order granting summary judgment. (LF 1252-70). Scottsdale's "Motion for Reconsideration" did not move for an extension of time or for an order allowing them to file their Response out of time. (LF 1252-70). In its "Motion for Reconsideration", Scottsdale did not argue its failure to file its Response on October 1, 2012 constituted "excusable neglect." (LF 1252-70).

In Scottsdale's Reply Brief in Support of its "Motion for Reconsideration," Scottsdale mentioned for the first time that "the Court should have taken into consideration whether any neglect on [Scottsdale's] part was 'excusable' under Rule 74.06(b)" (LF 1364). However, Scottsdale's Reply Brief did not move the trial court pursuant to Mo. R. Civ. P. 74.06(b) for relief from the trial court's November 1, 2012 Order granting summary judgment in Addison's favor. (LF

1252-70, 1364-74). Scottsdale did not move for relief pursuant to Rule 74.06(b) either orally or in writing while Judge Ravens had jurisdiction over this matter. (Tr. p. 1-13, LF 1252-70, 1364-74).

Judge Ravens entered Judgment Sustaining Addison's Motion for Summary Judgment on December 4, 2012. (LF 1376-81). This appeal follows.

POINTS RELIED ON

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ADDISON BECAUSE THE TRIAL COURT PROPERLY FOUND BASED UPON UNDISPUTED FACTS THAT ADDISON WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT MISSOURI LAW DOES NOT RECOGNIZE A CAUSE OF ACTION FOR BAD FAITH FAILURE TO SETTLE BY AN EXCESS INSURANCE CARRIER AGAINST A PRIMARY INSURANCE CARRIER WHERE THE EXCESS INSURANCE CARRIER MAKES A VOLUNTARY DECISION TO PAY MONEY TO SETTLE A CLAIM

Am. Guar. and Liab. Ins. Co. v. U.S. Fidelity & Guar. Co., 693 F. Supp. 2d 1038 (E.D. Mo. 2010), aff'd, 668 F.3d 991 (8th Cir. 2012).

Quick v. Nat'l Auto Credit, 65 F.3d 741 (8th Cir. 1995).

Minden v. USF Ins. Co., Inc., No. 4:11CV01284 AGF, 2012 WL 1866598 (E.D. Mo. May 22, 2012).

POINT II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ADDISON BECAUSE ADDISON MET ITS THRESHOLD BURDEN IN DEMONSTRATING THAT IT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT 1) SCOTTSDALE'S RESPONSE WAS NOT TIMELY FILED PURSUANT TO MO. R. CIV. P. 74.04(c)(2) AND THUS, ADDISON'S FACTS WERE DEEMED ADMITTED, 2) SCOTTSDALE FAILED TO REQUEST AN EXTENSION OF TIME IN WHICH TO RESPOND, AND 3) ADDISON WAS JUSTIFIED IN RELYING ON THE PLEADINGS OF THE PARTIES TO SUPPORT ITS STATEMENT OF FACTS

Chopin v. Am. Auto. Ass'n. of Missouri, 969 S.W.2d 248 (Mo. App. 1998).

Dyer v. Gen. Am. Life Ins. Co., 541 S.W.2d 702 (Mo. App. 1976).

Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 68 (Mo. 2000).

Rasse v. City of Marshall, 18 S.W.3d 486 (Mo. App. 2000).

POINT III

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN ADDISON'S FAVOR BECAUSE THE COURT WAS DEPRIVED OF ANY AUTHORITY TO GRANT AN EXTENSION OF TIME TO RESPOND TO ADDISON'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO MO. R. CIV. P. 44.01(b) OR ANY AUTHORITY TO GRANT SCOTTSDALE RELIEF FROM THE ORDER GRANTING SUMMARY JUDGMENT PURSUANT TO MO. R. CIV. P. 74.06(b) ON THE BASIS OF EXCUSABLE NEGLECT IN THAT SCOTTSDALE NEVER SOUGHT AN ORDER FROM THE TRIAL COURT GRANTING SUCH RELIEF

In re Carol Coe, 903 S.W.2d 916 (Mo. 1995) (en banc).

Lowdermilk v. Vescovo Bldg. & Realty Co., Inc., 91 S.W.3d 617 (Mo. 2002).

Southwestern Bell Yellow Pages, Inc. v. Wilkins, 920 S.W.2d 544 (Mo. App. 1996)

POINT IV

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ADDISON BECAUSE SCOTTSDALE DID NOT FILE A REQUIRED RESPONSE TO ADDISON'S MOTION FOR SUMMARY JUDGMENT IN THAT SCOTTSDALE NEVER MOVED THE COURT FOR AN EXTENSION OF TIME TO FILE THEIR RESPONSE OUT OF TIME AND SCOTTSDALE NEVER FILED A MOTION FOR RELIEF BASED ON EXCUSABLE NEGLECT

St. Louis County v. Prestige Travel, Inc., 344 S.W.3d 708 (Mo. 2011) (en banc).

Koerber v. Alendo Bldg. Co., 846 S.W.2d 729 (Mo. App. 1992).

ARGUMENT

POINT I

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ADDISON BECAUSE THE TRIAL COURT FOUND BASED UPON UNDISPUTED FACTS THAT ADDISON WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT MISSOURI LAW DOES NOT RECOGNIZE A CAUSE OF ACTION FOR BAD FAITH FAILURE TO SETTLE BY AN EXCESS INSURANCE CARRIER AGAINST A PRIMARY INSURANCE CARRIER WHERE THE EXCESS INSURANCE CARRIER MAKES A VOLUNTARY DECISION TO PAY MONEY TO SETTLE A CLAIM

A. Standard of Review

In Point One of its Substitute Brief, Scottsdale argues that the trial court erred in granting summary judgment in Addison's favor by finding on the merits that Scottsdale could not proceed under any of its multiple bad faith failure to settle (BFFS) theories. However, the trial court in the present case never reached the merits of Addison's Motion for Summary Judgment because the trial court held Scottsdale's Response was untimely and, therefore, Addison's facts were deemed admitted. (LF 1250-51). Judgment was then entered based upon the facts deemed

admitted. (LF 1376-81). A central arguments in Scottsdale's appeal is that Addison's Motion for Summary Judgment was defective in that its statement of facts relied upon the parties' pleadings and that the court erred in not granting either an extension or relief due to excusable neglect. In these arguments, Scottsdale maintains that summary judgment resulted from procedural deficiencies. Because Scottsdale alleges that judgment was entered due to a procedural error, Addison respectfully requests that Scottsdale's appeal, including Point One of Scottsdale's Substitute Brief, be reviewed on an abuse of discretion standard. Rasse v. City of Marshall, 18 S.W.3d 486, 488 (Mo. App. 2000).

B. Argument

This Court should affirm the trial court's Judgment and hold that Missouri law does not recognize a case of action for BFFS by an excess insurance carrier against a primary insurance carrier, and even if Scottsdale were authorized to pursue such a claim under Missouri law, Scottsdale's voluntary payment to settle the Childress claim does not create a BFFS claim.

1. The Trial Court Correctly Held that Missouri Does Not Recognize BFFS Between Excess and Primary Insurance Carriers

Since 1950, Missouri insureds have had the right to hold their own insurer liable for failing to settle a claim against them when the insurer acts in bad faith.

See Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950). The Zumwalt court held that bad faith meant "the intentional disregard of the financial interest of the insured in the hope of escaping the full responsibility imposed upon it by its policy." Id. at 754. There is no Missouri authority which authorizes Scottsdale's bad faith failure to settle claim against Addison. Scottsdale recognizes this in its Substitute Brief by admitting that "Missouri has yet to address the issue head-on." Scottsdale's Substitute Brief at 35. In fact, each time an excess carrier has attempted to assert such a claim under Missouri law, courts interpreting Missouri law have consistently rejected that claim.

In American Guarantee & Liab. Ins. Co. v. U.S. Fidelity & Guar. Co., 668 F.3d 991 (8th Cir. 2012), Zurich, the excess carrier, claimed that USF & G and TIG failed to settle wrongful death claims against their mutual insured. The court stated that "[t]he threshold issue is whether Missouri law permits Zurich, as an excess insurer, to bring a lawsuit for bad faith failure to settle against the primary insurer as a result of a direct duty owed by the primary insurer to an excess insurer, as an assignee, or under the principles of subrogation." Id. at 1047. The American Guarantee court stated that it "need not make [its] own prediction about how the Missouri Supreme Court would resolve the question because the Eighth Circuit has previously concluded that Missouri law does not permit the assignment of a bad

faith failure to settle claim." Id. at 1050 (citing Quick v. Nat'l Auto Credit, 65 F.3d 741 (8th Cir. 1995)).

In Quick, after an insured caused the death of a young girl, a default judgment was entered against him. Quick, 65 F.3d at 743. The insured then assigned his BFFS claim against his insurer to the decedent's mother. Id. The Eighth Circuit concluded that a claim for bad faith failure to settle is non-assignable under Missouri law. Id. at 746-47.

In Minden v. USF Ins. Co., Inc., No. 4:11CV01284 AGF, 2012 WL 1866598 (E.D. Mo. May 22, 2012), the Eighth Circuit again rejected the argument that BFFS claims can be assigned in Missouri. In that case, the liability carrier refused to defend its insurance against a wrongful death claim. The insured settled his case for $2 million with the decedent's family and assigned his rights under the policy to the decedent's family. Id. at 1. The decedent's family then sued the liability carrier pursuant to the assignment. Id. The trial court sustained the insurance carrier's motion to dismiss the BFFS claim, finding that Missouri law does not allow for the assignment of a BFFS claim. Id. at 2.

Missouri law does allow an excess insurance carrier to subrogate against a primary insurance carrier for the amount of the primary carrier's limits which should have been paid to settle a claim, but were not paid. Missouri Public Entity Risk Mgt. Fund v. Am. Cas. Co., 399 S.W.3d 68 (Mo. App. 2013). However, such

a subrogation claim is not a bad faith claim. In MOPERM, the excess carrier was seeking the primary carrier's contribution to the settlement from *within the primary carrier's limits* under a theory of equitable subrogation. The excess carrier was only seeking the primary carrier's portion of the settlement to be paid from the primary carrier's coverage. By contrast, Scottsdale, in the present case, seeks to collect *extra-contractual damages* from Addison under a bad faith tort theory. The latter is not recognized under Missouri law.

2. The Trial Court Properly Held Based Upon Scottsdale's Admitted Facts that There Was No BFFS Because Addison Had Paid Its $1 Million Limit and No Excess Judgment Was Entered Against Wells Trucking

The trial court held that "[b]ased on the findings of fact above, United Fire did not refuse, in bad faith or otherwise, to settle the claim within the liability limits of the policy as required for a bad faith failure to settle claim." (LF 1379). Scottsdale now asks this court to reverse the trial court's Judgment and to recognize BFFS by an excess carrier when it made a voluntary payment to settle the claim.

a. The Trial Court Properly Grant Summary Judgment to Addison Because Scottsdale Admitted Facts Which Defeated The Third and Fourth Elements of BFFS As

Identified In Shobe And This Court Should Not Recognize BFFS As a Cause of Action When This Case Does Not Demonstrate Bad Faith Conduct by Addison

The trial court properly granted summary judgment to Addison because Scottsdale had not demonstrated all elements of BFFS as Missouri courts have recognized that claim as one which can be brought by an insured against his own carrier. In Shobe v. Kelly, 279 S.W.3d 203 (Mo. App. 2009), the Western District recognized that the BFFS elements "*appear to be* that: (1) the liability insurer has assumed control over the negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer acts in bad faith, rather than negligently." Id. at 210 (citing Dyer v. Gen. Am. Life Ins. Co., 541 S.W.2d 702, 705 (Mo. App. 1976)) (emphasis by the Shobe court). Bad faith is defined as "disregarding the interests of its insured in hopes of escaping its responsibility under the liability policy." Shobe, 279 S.W.3d at 210 (citing Overcast v. Billings Mut. Ins Co., 11 S.W.3d 62, 67-68 (Mo. 2000) (en banc)).

In the present case, Scottsdale admitted that Addison had paid its $1 million to settle the case, eliminating the third element of BFFS as described in Shobe, which requires that the primary carrier *refuse* to settle the claim within its limits.

(LF 269, 1251). The trial court went on to find that Addison had not acted in bad faith. (LF 1389). Therefore, this Court should affirm the trial court's Judgment and decline to address the question of whether an excess carrier may sue a primary carrier for BFFS.

Aside from the trial court's holding that Scottsdale had admitted facts which defeated their claim for BFFS, this Court should not recognize BFFS by an excess carrier because Scottsdale's payment of $1 million to settle the Childress claim was a voluntary payment in light of the fact that Scottsdale's evaluation of the claim was similar to that of Addison.

Because the two carriers were like-minded in their evaluations, Addison's settlement position was not in bad faith. Although most of the testimony of the claims handlers was not before the trial court on Addison's Motion for Summary Judgment, Scottsdale seeks this Court's Opinion that BFFS can be pursued by an excess carrier. For this reason, Addison offers this Court the depositions of the claims handlers for both companies so that this Court has the benefit of the available facts regarding whether Scottsdale's $1 million payment was voluntary.

Scottsdale's claims handler testified that her independent evaluation throughout the case was that the decedent was 70% at fault and the insured driver was 30% at fault. (App. at A3-4). By comparison, before accident reconstruction evidence was developed, Addison had evaluated the decedent's fault as 80% and

the insured driver's fault at 20%. (LF 907). Scottsdale never asked Baker for a written evaluation of the claim. (App. at A16). Scottsdale's claim file did not include defense counsel's estimated percentage of fault on each driver or any evaluation of damages by defense counsel which indicated that the value of the case exceeded Addison's $1 million limit. (App. at A16). Scottsdale's claims file includes no note that defense counsel believed the jury would award in excess of $1 million. (App. at A16-17). Scottsdale was not aware of any verdicts in the county where the wrongful death action was pending or in the state of Missouri where a wrongful death verdict exceeded $5 million. (App. at A20-21). In fact, Scottsdale set its reserve at $500,000 and only increased its reserve to $1 million after Baker reported on the depositions of the plaintiffs' accident reconstructionists in late August 2009, nearly a year after Scottsdale began monitoring the claim. (App. at A8, LF 711-14). Had Scottsdale believed the value of the case was $2 million before the $3 million dollar demand was received, it would have set its reserves at $2 million.

Throughout the litigation, Scottsdale never expressed any objection to Addison's evaluation of the claim as it was communicated through defense counsel, Mike Baker. (App. at A20). Scottsdale never contacted Addison to discuss that Scottsdale believed that the claim's value exceeded $1 million. (App. at A18-19). Scottsdale never called Addison to discuss Addison's evaluation of

the claim. (App. at A20). Scottsdale admitted that it had agreed with the comparative fault evaluation of defense counsel and defense counsel's handling of the claim. (App. at A19-20). Scottsdale never told defense counsel to engage in discovery or that he should move quicker to depose the plaintiffs' accident reconstructionists. (App. at A19). Although Scottsdale suggests that Addison's evaluation was in bad faith in part because Probst was driving illegally, defense counsel had obtained a legal opinion, which was shared with Scottsdale, that Probst's operation of the vehicle under the federal motor carrier law was legal. (LF 737-738; App. at A47, A86-87). The evaluations of both companies changed only when Baker reported on August 31, 2009, after the depositions of the plaintiffs' accident reconstructionsts, that plaintiffs could credibly prove that the insured driver had up to 50% fault. (App. at A3-4, LF 691, 907). At that same time, Baker reported to both carriers that he was concerned that the accident reconstructionist hired by the defense would have to admit that the insured vehicle was speeding. (LF 690, App. at A8) At that point, Scottsdale increased its reserves from $500,000 to $1 million. (App. at A8). Eight days later, Addison tendered its $1 million limit to plaintiffs. (LF 1067). The facts indicate that prior to the $3 million demand, both carriers believed the insured's comparative fault was 30% or less and Scottsdale believed that the case was not worth in excess of a total of $1.5 million. After the demand and the depositions of the accident

reconstructionists, both carriers' evaluations changed and Addison immediately tendered its limits.

Scottsdale's $1 million payment does not establish that Addison acted in bad faith. This Court should affirm the trial court's Judgment.

b. The Trial Court Properly Granted Summary Judgment for Addison Because No Excess Judgment Was Entered Against Wells Trucking and This Court Should Not Recognize BFFS by an Excess Carrier When Scottsdale's $1 Million Excess Payment Was Voluntary

Because the Childress claim settled at mediation, the case did not proceed to trial, and no excess judgment was entered against Probst and Wells Trucking. The trial court in this case properly granted summary judgment to Addison on Scottsdale's BFFS claims in finding that the insured was never exposed to an excess judgment or damaged and, therefore, Scottsdale did not have a viable claim for BFFS under Missouri law. (LF 1389-90).

Aside from the four elements of BFFS referenced in Shobe, courts interpreting Missouri law have held that an excess judgment is required in order for an insured to pursue a claim for bad faith failure to settle. When BFFS was first recognized in Missouri, the Zumwalt court recognized that a claim for bad faith against the insurer would be for the amount of the judgment recovered against the

insured which exceeded the policy limits. The Zumwalt court recognized the cause of action as follows:

> "[T]he weight of authority is that where the insurer in a liability policy reserves the exclusive right to contest or settle any claim brought against the assured, and prohibits him from voluntarily assuming any liability or settling any claims without the insurer's consent, except at his own costs, and the provisions of the policy provide that the insurer may compromise or settle such a claim within the policy limits, no action will lie against the insurer *for the amount of the judgment recovered against the insured in excess of the policy limits*, unless the insurer is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy."

Zumwalt, 228 S.W.2d at 753 (emphasis added). All reported decisions in Missouri involving bad faith failure to settle have involved an excess judgment. See Bonner v. Auto. Club Inter-Insurance Exch., 899 S.W.2d 925, 926-27 (Mo. App. 1995); State Farm Fire & Cas. Co., v. Metcalf, 861 S.W.2d 751, 752 (Mo. App. 1993); Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 556-61 (Mo. App. 1990); Landie v. Century Indem. Co., 390 S.W.2d 558, 560-61 (Mo. App. 1965); Shobe v. Kelly, 279 S.W.3d 203 (Mo. App. 2009); Johnson v. Allstate Ins. Co., 262 S.W.3d 655 (Mo. App. 2008).

Federal courts applying Missouri law have also recognized that an excess judgment against the insured is required to pursue a bad faith failure to settle claim. "[A]lthough it is not technically set forth as an element of the claim, it would appear that Missouri courts have always assumed that an excess verdict is necessary." Amoco Oil Co. v. Reliance Ins. Co., No. 96-0011-CV-W-6, 1998 WL 187336 *3 (W.D. Mo. April 14, 1998). Courts in other jurisdictions have recognized that an excess judgment is a requirement before pursuing a BFFS claim. See Romstadt v. Allstate Ins. Co., 59 F.3d 608, 611 (6th Cir. 1995) ("under Ohio law, implicit in bringing an action against an insurer for bad faith with respect to settling a claim within policy limits, it is a requirement that there be an excess judgment against the insured"; A.W. Huss Co. v. Continental Cas. Co., 735 F.2d 246, 253 (7th Cir. 1984) ("It is irrefutable that under Wisconsin law plaintiff's bad faith claim lacks an element upon which Wisconsin bad faith claims involving third parties . . . are predicated – the insured's liability for an excess judgment"); Ragas v. MGA Ins. Co., No. 96-2263, 1997 WL 79357 (E.D. La. 1997) (applying Louisiana law); Jarvis v. Farmers Ins. Exch., 948 P.2d 898 (Wyo. 1997); Catholic Relief Ins. Co. of Am. v. Liquor Liability Joint Underwriting Ass'n of Mass., 8 Mass. L. Rptr. 80, 1997 WL 781448 *23 (Mass. Sup. Ct. Dec. 22, 1997) ("The existence of a judgment in excess of the policy limits [is] a prerequisite to [the insured's] claim" of BFFS); Kelly v. Williams, 411 So.2d 902, 903-05 (Fla. App.

1982) ("a cause of action for bad faith arises when the insured is legally obligated to pay a judgment that is in excess of his policy limits").

Scottsdale now seeks to recover from Addison the $1 million paid under its policy despite that neither Probst nor Wells Trucking was ever exposed to an excess judgment. Missouri law prohibits the assignment of tort actions based on wrongful negligent acts resulting in personal injuries because it would lead to a secondary market where speculators would profit off of the pain and suffering of others. See Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208, 213 (Mo. App. 1967); see also Scroggins v. Red Lobster, 325 S.W.3d 389, 392 (Mo. App. S.D. 2010). However, Missouri recognizes that when a bad faith claim has been reduced to a judgment, it becomes a property right and may be assigned. Marshall v. N. Assurance Co. of Am., 854 S.W.2d 608, 610 (Mo. App. W.D. 1993). In the present case, in lieu of an excess judgment which would be actionable by the insured against Addison, Scottsdale paid the Childress claim, then sought an assignment from its insured to "buy" any bad faith claim Probst and Wells Trucking may have against Addison. Not only did Scottsdale threaten to sue Addison for all amounts it would pay prior to the mediation, (LF 1069-71), but also Scottsdale entered Addison's caucus room at mediation and informed Scottsdale that it planned to offer the plaintiffs $750,000 on top of Addison's $1 million. (App. at A134). Suddenly, Scottsdale was offering a total of $1.75

million to settle a case when plaintiffs had demanded $1 million even after plaintiffs knew that the combined limits were $3 million. (LF 1027-33). Incidentally, the Childress family's $1 million demand was pending even after they were represented by attorney Tim Dollar. (LF 719-20, 1065).

Scottsdale's payment of $1 million of its excess coverage to settle the claim was a voluntary payment and not the result of the adversarial process of mediating a civil case. As indicated above, before mediation of the Childress claim, but after Addison had tendered its $1 million limit, Scottsdale had very clearly expressed its intention to sue Addison for any amount Scottsdale paid to settle the Childress claim. (LF 1067-1071). After making that threat to Addison, it no longer mattered to Scottsdale what amount it paid to settle the Childress claim because Scottsdale would seek that amount from Addison.

If this Court is inclined to recognize BFFS by an excess carrier, it must require an excess judgment be entered against the insured in cases where there is a settlement within the excess carrier's layer of coverage. In cases where a primary carrier has refused to offer its limits, this Court must require a settlement within the excess carrier's layer of coverage. The burden should be on the excess carrier pursuing the BFFS claim to demonstrate that the settlement was reasonable in that the amount paid was what a reasonably prudent carrier in the excess carrier's position would have settled for on the merits of the injured party's claim. See

Schmitz v. Great Am. Assurance Co., 337 S.W.3d 700, 708 (Mo. 2011) (en banc) (citing Gulf Ins. Co. v. Noble Broadcast, 936 S.W.2d 810, 815 (Mo. 1997) (en banc) (applying reasonableness test to equitable garnishment actions). If the law requires neither an excess judgment (in cases where a primary carrier has tendered its limits) nor a reasonableness test such as in Gulf Ins. Co., excess carriers are no longer in a true adversarial position with the injured party and will settle the injured party's claim for more than the claim is worth to pursue a BFFS claim against the primary carrier to recover the full amount of its payment. See Rupp v. Transcontinental Ins. Co., 627 F. Supp. 2d 1304 (D. Utah 2008) (finding an issue of fact as to whether excess insurer's settlement and stipulated judgment were collusive or entered into in bad faith). Why would an excess carrier only pay that portion of its limit it owes and simply close its file when it can settle or even overpay the injured party's claim then seek the full amount of its excess payment from the primary carrier? Particularly when the primary carrier, as in this case, had tendered and paid its policy limit, the potential for collusion is particularly troubling. Premiums charged by primary carriers to Missouri insureds will substantially increase to cover the business costs associated with defending and paying the subrogation claims of excess carriers in the name of BFFS.

Requiring an excess judgment in a BFFS case where the primary carrier has tendered its limits would prevent collusive settlements by excess carriers which

primary carriers will be asked to pay. Unless the law requires an excess judgment against an insured before a BFFS claim may be asserted by an excess carrier (when the primary carrier has tendered its limits), the excess carrier's payment is voluntary and likely does not represent the true settlement value of the claim. In the present case, there is no testimony from the Childress family or their attorneys that they would not have settled for $1 million which had been their only demand up until shortly before the mediation. The fact that Scottsdale immediately tendered $750,000 at mediation in comparison with its evaluation suggests that Scottsdale's $1 million payment exceeded full value of the Childress claim. If this Court recognizes that excess carriers like Scottsdale may sue a primary carrier for BFFS, the law should place a check on the excess carrier's ability to enter into collusive settlements, such as requiring an excess judgment against the insured before such a claim may be filed in cases where a primary carrier has offered its limits. In the case of a settlement within the excess carrier's layer of coverage, the excess carrier should be required to prove that the excess carrier refused, in bad faith, to offer its policy limits.

Such checks on an excess carrier would not be necessary in an equitable subrogation case such as MOPERM, where the excess carrier only seeks to subrogate in equity for the amount of the primary carrier's limit which the excess carrier paid to settle the claim. In such a case, when the primary carrier refuses to

defend its insured and refuses to settle the claim against its insured, the excess carrier should and does have a right to subrogate in equity for the amount of the settlement it paid within the primary carrier's limits. See MOPERM, 399 S.W.3d at 76 (holding that excess carrier could equitably subrogate against primary carrier for amounts of settlement primary carrier was responsible to pay).

c. If This Court Recognizes that Excess Carriers May Sue for BFFS, a Non-futile Demand to Settle Should Be A Required Element of Such a Claim

Although in this case, Probst, Wells Trucking and Scottsdale each demanded that Addison settle the case before Addison tendered its limits, there is some uncertainty in the law regarding whether an insured must demand that the primary carrier settle the case before an insured may pursue a BFFS claim against his own carrier. Such a demand is the second of the four elements of BFFS identified in Shobe. Such a demand is required in the Eastern District. See Bonner v. Auto. Club Inter-Insurance Exch., 899 S.W.2d 925, 928 (Mo. App. E.D) (holding that a demand by the insured that the primary carrier settle the claim within the policy limits is an essential element of BFFS). However, in Shobe, the Western District has identified an exception to the requirement when an insurance carrier refused to defend its insured. In that case, the insured was not obligated to demand that the carrier settle her case. Shobe, 279 S.W.3d at 210. In other words, an insured is not

required to make a futile demand to settle. Id. at 211. In Ganaway, the absence of a demand by the insured to settle the claim did not preclude an insurer's liability for bad faith failure to settle when the insured was never consulted about the settlement negotiations. Ganaway, 795 S.W.2d at 564.

The Eighth Circuit has described these cases as setting forth a general rule requiring demand by the insured with two exceptions. In Am. Guar. & Liab. Ins. Co. v. U.S. Fidelity & Guar. Co., the court found that the general rule is that "[o]ne of the necessary elements of a BFFS claim under Missouri law is that the insured had demanded that the insurer settle the claim brought against the insured." 668 F.3d 991, 1002 (8th Cir. 2012) (citing Dyer v. Gen. Am. Life Ins. Co., 541 S.W.2d 702, 704 (Mo. App. W.D. 1976); and Bonner, 899 S.W.2d at 928) (quotation omitted). Am. Guar. further found that Missouri recognizes two exceptions to this general rule (1) when the insurer denies coverage and refuses to defend and (20 when the insured is not informed by the insurer of settlement offers. Id. (citing Shobe, 279 S.W.3d at 210; and Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 564 (Mo. App. S.D. 1990).

This Court should require that either the insured or the excess carrier make a non-futile settlement demand on the primary carrier before a BFFS claim can be pursued against the primary carrier. Particularly for an excess carrier with substantial litigation experience, it would be inequitable for an excess carrier to

review and either agree or acquiesce in a primary carrier's settlement evaluation and not demand that the claim be settled, then once the claim is settled within its excess layer or an excess judgment is entered, to allege that the primary carrier acted in bad faith by refusing to settle the claim. If this Court determines it will recognize a new cause of action in equity, the Court should also require that equities are truly imbalanced and require court intervention. If an excess carrier's evaluation was substantially similar to the primary carrier's and the excess carrier did not demand settlement, the excess carrier's hands would be unclean in asserting a BFFS claim against the primary carrier. A non-futile demand from the excess carrier should be required if this Court intends to authorize excess carriers to pursue primary carriers for BFFS claims.

3. The Trial Court Properly Held that Scottsdale Had No BFFS Claim Against Addison Under a Theory of Equitable Subrogation Because Addison Was Not Unjustly Enriched

The trial court properly rejected Scottsdale's argument that it should recognize that an excess carrier may sue a primary carrier for BFFS under a theory of equitable subrogation. Scottsdale admitted, and the record in this case demonstrates, that Addison paid its $1 million policy limit. (LF 1172, 1387-90). "Subrogation exists to prevent unjust enrichment." MOPERM, 399 S.W.2d at 72 (citing Keisker v. Farmer, 90 S.W.3d 71, 75 (Mo. 2002) (en banc). Equitable

subrogation is a form of subrogation that is not founded in contract, but is a creature of equity. As with all forms of subrogation, equitable subrogation is intended to prevent unjust enrichment. Am. Nursing Resource, Inc. v. Forrest T. Jones & Co., 812 S.W.2d 790, 798 (Mo. App. W.D. 1991). "A right to restitution is established under unjust enrichment if the following elements are satisfied: (1) that the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; (3) that it would be unjust to allow the defendant to retain the benefit." MOPERM, 399 S.W.3d at 77 (citing Homecomings Fin. Network, Inc. v. Brown, 343 S.W.3d 681, 685 (Mo. App. W.D. 2011)). Scottsdale does not explain how Addison was unjustly enriched when it defended the claim until the settlement was final and paid its policy limit. Addison received no benefit whatsoever which the principles of equity should be employed to take away. Unlike the primary carrier in MOPERM who refused to defend or settle the claim against its insured, Addison fully defended its insured and paid its policy limit. Addison was not unjustly enriched, so there is no basis in equity for an equitable subrogation claim.

Moreover, as in MOPERM, equitable subrogation allows an insurer to stand in the shoes of its insured with regard to the insured's cause of action. However, a bad faith failure to settle claim does not exist where an insured is subject to no personal loss from a final judgment. Fed. Ins. Co. v. Travelers Cas. & Surety Co.,

843 So.2d 140, 144 (Ala. 2002). Where the insured sustains no loss because no excess judgment resulted, Scottsdale has no claim to assert as it stands in the insureds' shoes. "Simply put, equitable subrogation cannot exist to provide a conduit to assert what are conclusively nonexistent rights." Id. at 145-46.

Scottsdale's equitable subrogation claim has been defeated by the settlement of the underlying claim. By settling the claim against Probst and Wells Trucking, both Addison and Scottsdale protected the insured from an excess judgment and any personal exposure. Probst and Wells Trucking, therefore, have no claim to bring in law or in equity against Addison because no damages resulted to Probst or Wells Trucking. "Under the doctrine of equitable subrogation, 'an excess insurer, paying a loss under a policy, 'stands in the shoes' of its insured with regard to any cause of action its insured may have against a primary insurer responsible for the loss.'" MOPERM, 399 S.W.3d at 74 (citing Royal Ins. Co. v. Am. v. Caliber One Indem. Co., 465 F.3d 614, 619, (5th Cir. 2006)). In MOPERM, the excess carrier was allowed to "stand in the shoes" of its insured to assert the insured's contract right that the primary carrier should have paid its share of the loss. There was no bad faith claim in MOPERM. Here, Scottsdale claims it should be able to "stand in the shoes" of Wells Trucking and Probst to assert the insureds' right to a duty of good faith under the Addison policy against Addison under a theory of equity. However, in this case, the settlement with the Childress family was designed to

prevent any damage to Probst and Wells Trucking. Probst and Wells Trucking have no bad faith claim to assert against Addison because Probst and Wells Trucking have not been damaged. "[I]t is well settled that a bad-faith-failure-to-settle claim does not exist where the insured is subject to no personal loss from a final judgment." Fed. Ins. Co., 843 So.2d at 144. As argued above, in each Missouri BFFS case brought by an insured, an excess judgment has existed. When Scottsdale steps into the shoes of Probst and Wells Trucking, there is no bad faith claim belonging to Probst and Wells Trucking to assert. Therefore, this Court should not adopt BFFS by an excess carrier against a primary carrier under a theory of equitable subrogation because there was never a BFFS claim or BFFS damages.

a. Equitable Subrogation Does Not Support Allowing Excess Carriers to Profit From Subrogation

The nature of equitable subrogation is that the court's power is used to establish an equitable lien against a party who, in justice and equity, should pay the debt. See Homecomings Fin. Network, Inc. v. Brown, 343 S.W.3d 681, 685 (Mo. App. W.D. 2011); State ex. rel. Missouri Highways & Transp. Comm'n v. Westgrove Corp., 364 S.W.3d 695, 699 (Mo. App. E.D. Mo. 2012). When the power of the court is used to balance the equities among the parties, there is no basis for the court to award the complaining party additional amounts over and

above that which is owed. In this case, Scottsdale seeks general tort damages, punitive damages, and attorneys' fees. These damages claims go beyond the purpose of equitable subrogation and beyond the court's power under a theory of equitable subrogation.

b. BFFS By An Excess Carrier Does Not Promote Judicial Efficiency

The policy of the law is to encourage settlements. Lowe v. Norfolk v. W. Ry. Co., 753 S.W.2d 891, 894-95 (Mo. 1988) (en banc). BFFS claims by an excess carrier brought after the claim against the insured was settled do not promote judicial efficiency. This is because liability and damages will ultimately have to be litigated in the BFFS action to determine whether the primary carrier was acting bad faith while handling the claim. Unless liability and damages in the underlying action are litigated, the true value of the case will not be known, and therefore it will always be disputed whether the excess carrier's payment was reasonable. It would be more efficient to require that an excess judgment be a prerequisite to BFFS cases where the primary carrier has offered and paid its policy limit.

c. There Is No Public Policy Need for Authorizing Excess Carriers to Sue Primary Carriers for BFFS

The policy reasons for recognizing BFFS claims by insureds and BFFS claims to be brought by excess carriers are not the same. In an insurance contract, an insured expressly relinquishes to the insurer the right to control the defense and settlement of any action arising under the contract. See Fed. Ins. Co., 43 So.2d at 143. The insured's reliance on the abilities and the good faith of the insurer is at a maximum. Id. By contrast, an excess carrier monitors the litigation, receives reports from defense counsel, and expressly reserves the right to step into the case at its option. In this case, Scottsdale's policy states, "[w]hen we have no duty to defend, we will have the right to defend, or to participate in the defense of, the insured against any other 'suit' seeking damages to which this insurance may apply." (LF 116). Moreover, there is a difference in bargaining power between an insurer and an insured when compared to a primary insurer and an excess insurer. Id. The contract shifts the financial risk from the insured, with minimal litigation experience, to the insurer, with substantial litigation experience. Id. Primary and excess insurance carriers stand on more equal footing. Id. Each has the responsibility to draft its own insurance contract. Id. Each is assumed to have litigation experience. Id. Without a contract, there can be no contractual shifting of financial risk. Id. "Simply put, the primary-insurer/excess-insurer relationship does not involve the same policy considerations that justify imposing on those

insurers the duty of good faith to settle that currently exists between an insured and his insurer." Id. at 143-44.

d. This Court Should Not Recognize BFFS By an Excess Carrier Against a Primary Carrier When the Excess Carrier Is Fully Informed of the Litigation and Has the Right To Settle The Entire Loss If It Believes the Primary Carrier Has Acted in Bad Faith

Unlike an insured who gives up the right to control the litigation to his insurer, an excess carrier reserves the right to monitor and control the litigation. When an insured is being defended under a reservation of rights, he is free to reach a reasonable settlement of his own, which he can enforce against the insurer. Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 94 (Mo. App. 2005). If an insured is receiving a full defense and an excess judgment is entered against him, he has the right under Missouri law to pursue a claim for BFFS for the amount of the excess judgment. See Zumwalt, 228 S.W.2d at 756. However, an excess carrier, like Scottsdale, reserves in its policy the right to monitor and control the litigation. Scottsdale has substantial litigation experience. If Scottsdale believed that Addison's actions were in bad faith, as it claimed when it demanded settlement in January 2009, (LF 1039-40) and again before the mediation, (LF 1069-71), Scottsdale could have settled the Childress claim. In fact, such a practice

was authorized and encouraged in MOPERM, a case where no bad faith was alleged. By contrast, Probst and Wells Trucking received a full defense and had no such right to settle the Childress claim on their own. Because excess carriers are encouraged to settle claims against their insured even when a primary carrier will not, there is no risk of damage to an excess carrier that the law should protect such as the risk of damage to an insured from an excess judgment.

4. The Trial Court Properly Held that Scottsdale Could Not Sue Addison for BFFS Claim Based Upon Its Insured's Written Assignment of an Unliquidated Tort Claim

Scottsdale argues that it may pursue its BFFS claim against Addison as Wells Trucking's assignee. First, even assuming BFFS claims are assignable under Missouri law, Scottsdale is not entitled to the damages it seeks in this case based on well-established assignment principles. Second, although no Missouri court has directly addressed the issue, BFFS claims are not assignable under Missouri law.

a. Scottsdale Is Not Entitled to Recovery Based On Well-Established Assignment Principles

In an assignment, the assignor gives all of its rights to the assignee. Keisker v. Farmer, 90 S.W.3d 71, 74 (Mo. 2002) (en banc). "When there is an assignment of an entire claim there is a complete divestment of all rights from the assignor and

a vesting of those same rights in the assignee." Holt v. Myers, 494 S.W.2d 430, 437 (Mo. App. 1973).

Accordingly, an assignee is only entitled to pursue and recover damages that the assignor would have been able to recover itself. This is because "[t]he only rights or interests an assignee acquires are those the assignor had at the time the assignment was made." Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112, 128 (Mo. 2010) (en banc). "Because an assignee merely steps into the shoes of the assignor, an *assignee* must allege facts showing that the *assignor* would be entitled to relief." Id. (emphasis in original).

In this case, the assignment from Wells Trucking would only allow Scottsdale to pursue damages that Wells Trucking incurred in the underlying case. It is undisputed, though, that Wells Trucking was never subjected to an excess judgment, was not responsible for paying any of the settlement monies, and after the settlement is no longer subject to any exposure. Instead, Scottsdale is seeking to recover its own damages, i.e., the $1 million it paid at mediation to settle the case. Indeed, the Court of Appeals found:

> Here, Scottsdale is not seeking to recover damages incurred by Wells Trucking. Scottsdale is seeking to recover damages it incurred—the $1 million it paid from the excess policy limits. Because the damages Scottsdale seeks to recover were not incurred by Wells Trucking, the

assignment lends nothing to Scottsdale's efforts to recover its damages.

Scottsdale Ins. Co. v. Addison Ins. Co. No. WD 75963 2013 WL 5458918, *6 (Mo. App. W.D. October 1, 2013).[2]

[2] Commentators on the subject agree. See, e.g., Ashley, Stephen, Bad Faith Actions Liability & Damages § 6:12 (2d ed.) ("The primary insurer's refusal to settle exposed the insured to no risk of an excess judgment, and it did not force the insured to pay anything or suffer harm to his credit rating due to an unpaid outstanding judgment. The party harmed by the insurer's bad faith, and the only party harmed, was the excess carrier. The insured, having suffered no harm, had no cause of action to assign."); Windt, Allan, 2 Insurance Claims and Disputes § 7:8 (6th ed.) ("[I]f the excess insurer has obtained an assignment from the insured, it has been held that the excess insurer has standing to sue as an assignee with regard to the primary insurer's breach of duty. This position is not justifiable. Such an assignment should be ineffective because by virtue of the protection afforded by the excess insurer, the insured would not have incurred any injury by reason of the primary insurer's wrongful refusal to settle. Absent an injury, however, no cause of action can accrue that can be assigned. While it is true, in virtually all states, that an insured need not actually pay an excess judgment in

Scottsdale attempts to counter this notion by arguing that an insured is not required to actually pay an excess judgment in order to have been damaged by an insurer's bad faith. Even if this were true, the argument ignores the fact that Scottsdale is seeking to recover the $1 million dollars that it paid, not some alleged nominal damage to Wells Trucking. Because Scottsdale seeks to recover its own damages, it cannot proceed on its BFFS claim against Addison based on the assignment from Wells Trucking.

b. BFFS Claims Are Not Assignable

To the extent that Scottsdale is seeking to recover Wells Trucking's damages based on the alleged BFFS claim, this Court should find that such claims are not assignable. Although Missouri law has long recognized that some claims are assignable, courts have consistently held that those claims based on personal injuries and wrongs are not.

In Missouri, the types of claims "which are not assignable are those for torts for personal injuries, and for wrongs done to the person, the reputation, or the feelings of the injured party, and those based on contracts of a purely personal nature, such as promises of marriage." Beall v. Farmers' Exch. Bank, 76 S.W.2d 1098, 1099 (Mo. 1934) (citing State ex rel Park Nat'l Bank v. Globe Indemnity

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order to be deemed to have been injured by it, at the very least, the judgment must remain outstanding in order for an injury to arise.").

Co., 61 S.W.2d 733, 736 (Mo. 1933)). The line appears to be that actions based upon wrongful acts resulting in personal injuries are not assignable, while actions based upon wrongful acts resulting in damage to property are assignable. See Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208, 217 (Mo. App. E.D. 1967).

No Missouri court has directly addressed whether BFFS claims are assignable. However, in Quick v. National Auto Credit, the Eighth Circuit held that BFFS claims are not assignable under Missouri law. 65 F.3d 741 (8th Cir. 1995). In Quick, the court entered a default judgment against the defendant in a wrongful death suit involving the death of a young girl. Id. at 743. The defendant then assigned his BFFS claims against his insurer to the decedent's mother. Id. On appeal, the Eighth Circuit noted that in Missouri, actions for personal injuries are not assignable, and held that "[u]nder this scheme [the defendant's] bad faith cause of action is not assignable." Id.

The holding in Quick has since been followed by district courts within the Eighth Circuit. See Am. Guar. & Liab. Ins. Co. v. U.S. Fidelity & Guar. Co., 693 F. Supp. 2d 1038, 1050 (E.D. Mo. 2010), aff'd, 668 F.3d 991 (8th Cir. 2012) ("the Eighth Circuit has previously concluded that Missouri law does not permit the assignment of a bad faith failure to settle claim"); Minden v. USF Ins. Co. Inc., No. 4:11-CV01284 AGF, 2012 WL 1866598 (E.D. Mo. 2012) (dismissing assigned

BFFS claim because "Missouri law, as interpreted by the Eighth Circuit," precludes such claims).[3]

c. Scottsdale's Arguments Are Not Persuasive

Scottsdale first argues that Mo. Rev. Stat. §537.065 recognizes the assignability of BFFS claims. This argument fails to recognize the distinction between a tort claim that has been reduced to judgment and an unliquidated tort claim. See Marshall v. N. Assur. Co. of Am., 854 S.W.2d 608, 610 (Mo. App. W.D. 1993) (public policy reasons prohibiting assignment of a personal injury claim do not apply where the claim has been reduced to a judgment). Section 537.065 contemplates that parties may agree that, "in the event of a judgment," one party will only seek to execute on the judgment against specific assets or pursuant to specific procedures. Section 537.065 does not, however, alter the common law with respect to the assignment of unliquidated tort claims for personal injuries. See Johnson v. Allstate Ins. Co., 262 S.W.3d 655, 674 (Mo. App. W.D. 2008) (Smart, J. concurring).

[3] Scottsdale argues that the holding in Quick is "pure *dicta*." First, the court in Quick specifically stated "[a]ccordingly, we hold that [the defendant's] bad faith cause was nonassignable." Quick, 65 F.3d at 747. Second, the court in American Guarantee addressed this argument and found that Quick's holding was not *dicta*. American Guarantee, 693 F.Supp.2d at 1050.

Scottsdale also cites several cases as authority that Missouri courts recognize that BFFS claims are assignable. That is not the case. Most of the cases cited by Scottsdale do not actually address the assignability issue, which Scottsdale takes to mean that the courts implicitly believe BFFS claims are assignable. As in any appeal, though, the issue may not have been addressed for a variety of reasons.

In fact, the only case cited by Scottsdale that arguably addresses the issue is Ganaway. Ganaway is distinguishable on its facts because it involved the assignment of a claim by a bankruptcy trustee pursuant to express statutory authorization. In Quick, the court recognized the conflict between Ganaway and established Missouri assignment law, finding that "Ganaway runs upstream from clearly established Missouri law." Quick, 65 F.3d at 746-47.

The status of Missouri decisions on this issue has perhaps most directly been analyzed by Judge Smart's concurring opinion in Johnson. See Johnson, 262 S.W.3d at 669. In that case, the court did not reach the assignability issue because it was not preserved for review. Id. Judge Smart issued a concurring opinion, however, because he was "unconvinced that the [plaintiffs] were entitled to participate as assignees," and he "wish[ed] to express uncertainty as to the purported assignability" of the BFFS claim. Id. In discussing the uncertainty in Missouri cases, Judge Smart recognized that BFFS claims are personal to the insured, and stated that "[t]raditionally, it would seem that a BFFS claim

would *not* be assignable because it is a personal tort claim like legal malpractice or breach of fiduciary duty." Id. at 671-72 (emphasis in original).

Missouri courts, then, have not found that BFFS claims are assignable as Scottsdale argues. In fact, the concurring opinion in Johnson indicates that BFFS claims are personal, and therefore not assignable, similar to malpractice and breach of fiduciary duty claims. Moreover, the uncertainty of Missouri decisions highlights the importance of Quick, which is the best guiding interpretation of Missouri law.

5. The Trial Court Properly Held That Scottsdale Could Not Assert a BFFS Claim Under a Contractual Subrogation Theory

Scottsdale next argues that it may pursue its BFFS claim against Addison under a contractual subrogation theory. This argument has no merit, as the contract between Scottsdale and Wells Trucking does not create additional rights in favor of Scottsdale as against Addison.

First, it is important to note that whether through an express assignment or a subrogation provision in an insurance policy, the result for the insurer is essentially the same. In both an assignment and contractual subrogation, the insurer acquires only the rights to recovery that were originally held by the insured.

There are differences though between assignment and subrogation. In Keisker, the Supreme Court stated:

> Assignment of a claim differs from subrogation to a claim. In assignment, the assignor gives all rights to the assignee. By an assignment, the insurer receives legal title to the claim, and the exclusive right to pursue the tortfeasor.
>
> In subrogation, the insured retains legal title to the claim. By paying the insured, the insurer has a right to subrogation. The exclusive right to pursue the tortfeasor remains with the insured, which holds the proceeds for the insurer.

Keisker, 90 S.W.3d at 74 (internal citations omitted).

Here, Scottsdale's policy with Wells Trucking states in pertinent part that "if [Wells Trucking] has rights to recover all or part of any payment we have made under this Coverage . . ., those rights are transferred to us . . .. At our request, the insured will bring 'suit' or transfer those rights to us and help us enforce them." (LF 127). This provision outlines the rights between Scottsdale and Wells Trucking in the event that Scottsdale makes a payment under the policy. The words "assignment" and "subrogation" are not expressly used, but the language provides that Wells Trucking will either bring suit in its own name for the benefit

of Scottsdale (subrogation) or transfer its rights to Scottsdale and "help" in a suit by Scottsdale (assignment).

In this case there is no dispute that Wells Trucking assigned its rights to Scottsdale, and a BFFS claim against Addison based on that assignment fails for the reasons stated above. Moreover, because Wells Trucking assigned its rights to Scottsdale, there can be no contractual subrogation because in subrogation the insured holds legal title to the claim. But once there is an assignment, as here, "there is a complete divestment of all rights from the assignor and a vesting of those same rights in the assignee." Holt v. Meyers, 494 S.W.2d 430, 437 (Mo. App. 1973).

Even if Scottsdale's subrogation rights survived after the assignment, Scottsdale's BFFS claim against Addison still fails. Contractual subrogation does not create a cause of action for the insurer to recover its own damages. It is only the contractual basis, between the insured and insurer, by which the insurer may assert the insured's rights in the event the insurer makes a payment under the policy. The Court of Appeals in this case recognized this, stating:

> The policy provision does not create a cause of action. It merely requires Wells Trucking to permit Scottsdale to assert Wells Trucking's rights to recover the payment made on its behalf. If we assume *arguendo*, that the scope of the provision includes claims

> Wells Trucking ***would have had*** to recover from United Fire but for Scottsdale's payment, the provision merely affords Scottsdale the contractual right to invoke the doctrine of subrogation as between it and Wells Trucking.

Scottsdale Ins. Co., No. WD 75963, 2013 WL 5458918, at *7 (emphasis in original). Here, Scottsdale is pursuing its own alleged damages according to its own alleged rights, not those of Wells Trucking. Scottsdale's BFFS claim based on contractual subrogation fails.

6. The Trial Court Properly Held That Scottsdale Could Not Assert a BFFS Claim Under a Direct Duty Theory

Scottsdale next argues that Missouri should recognize that primary insurers owe a direct duty of good faith to excess insurers. Such a duty is not supported either by current Missouri law or the majority of cases in other jurisdictions.

In Missouri, the duty to settle a case in good faith owed by an insurer to an insured stems from the contract between them. See e.g. Zumwalt at 756; Truck Ins., 162 S.W.3d at 93; ("Inherent in a policy of insurance is the insurer's obligation to act in good faith regarding settlement of a claim. This obligation is part of what the insured pays for."). The duty of good faith arises because in the typical liability policy, the insured grants to the insurer the right to settle the case. Thus, "[u]nder Missouri law, an insurer, 'having assumed control of its right to

settle claims against the insured, may become liable in excess of its undertaking under the policy provisions if it fails to exercise good faith in considering offers to compromise the claim for an amount within the policy limits." Truck Ins., 162 S.W.3d at 94.

In the excess vs. primary insurer scenario, however, no contract exists between the parties to create a direct duty. The Court of Appeals agreed, finding:

> We can conceive of no basis to impose a duty on a primary insurer to act in good faith for the benefit of an excess carrier. The primary insurer's duty to negotiate in good faith for its insured is attendant to the contractual relationship between the insured and the insurer, and is in part a function of that which the insured is entitled to expect upon payment of a premium.

Scottsdale Ins. Co., No. WD 75963, 2013 WL 5458918, at *8.

Although Missouri courts have not addressed the issue, the Eighth Circuit has determined that Missouri courts would not recognize a direct duty owed by a primary insurer to an excess insurer. See Reliance Ins. Co. in Liquidation v. Chitwood, 433 F.3d 660, 664 (8th Cir. 2006) ("Missouri courts, however, have not recognized a direct duty of good faith between primary and secondary insurers.").

Moreover, the majority of jurisdictions recognize that no such duty exists for the benefit of an excess insurer. See e.g., Steadfast Ins. Co. v. Agricultural Ins.

Co., No. 10-5113, 2013 WL 6439671, *2 (10th Cir. December 10, 2013) ("Our conclusion is consistent with the majority of courts in other jurisdictions that have similarly determined that an excess insurer cannot assert a direct cause of action against a primary insurer that alleges the primary insurer owed the excess insurer an implied duty of good faith and fair dealing."); 28 Am. Jur. Proof of Facts 3d 507, § 14 (2011) ("Most courts that have been asked to determine if there is a direct duty of a primary insurer to an excess insurer (or a direct cause of action) have rejected the idea that there is such a duty."); Wall, Litig. & Prev. Ins. Bad Faith § 7:7 (3d ed.) ("[t]he majority of modern cases continues to recognize that no independent duty exists from the primary liability insurer to the excess liability insurer.").

Accordingly, this Court should hold that primary insurers owe no direct duty to excess insurers.

7. Alternatively, If this Court Authorizes An Excess Carrier to Sue A Primary Carrier for Bad Faith Failure to Settle, This Court Should Only Authorize Such a Carrier To Collect Amounts Paid As a Direct Result of the Primary Carrier's Bad Faith and Not General Tort Damages, Costs, or Attorneys' Fees

Scottsdale seeks not only the $1 million it paid from its layer of coverage to settle the Childress claim, but also tort damages, punitive damages, and attorneys' fees from Addison. If the Court recognizes BFFS as a cause of action which may be asserted by an excess carrier, this Court should decline to authorize excess carriers the right to seek tort damages beyond what was paid to settle the claim, punitive damages or attorneys' fees. As discussed above, the policy reasons for recognizing BFFS claims by insureds and BFFS claims to be brought by excess carriers are different. The arguments made by excess carriers are far less compelling than the arguments for allowing an insured to sue his own insurance carrier for BFFS, given that the excess carrier is a sophisticated entity with substantial litigation experience who wrote its own contract. In Shobe, the insured was able to recover tort damages for the loss of her good credit, interest which accrued on her mortgage and auto loans, and fears of bankruptcy. However, Scottsdale is not in the same position as an insured such as Ms. Shobe. Scottsdale is a corporation with litigation experience and the ability to hire attorneys skilled in insurance-related matters. An excess carrier suffers no damages in the form of higher interest rates, loss of insurance coverage, and fears of bankruptcy when it must pay a settlement into its layer of coverage for which it received a premium. This Court should recognize that there is no policy reason to allow excess carriers to seek general tort damages from primary carriers in BFFS cases. Moreover,

seeking punitive damages is inconsistent with the theory of equitable subrogation whereby the court is asked to balance the equities among the parties. Finally, unless there is statutory authority for an excess carrier's claim for attorneys' fees, attorneys' fees should not be awarded in BFFS claims.

POINT II

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ADDISON BECAUSE ADDISON MET ITS THRESHOLD BURDEN IN DEMONSTRATING THAT IT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT 1) SCOTTSDALE'S RESPONSE WAS NOT TIMELY FILED PURSUANT TO MO. R. CIV. P. 74.04(c)(2) AND THUS, ADDISON'S FACTS WERE DEEMED ADMITTED, 2) SCOTTSDALE FAILED TO REQUEST AN EXTENSION OF TIME IN WHICH TO RESPOND, AND 3) ADDISON WAS JUSTIFIED IN RELYING ON THE PLEADINGS OF THE PARTIES TO SUPPORT ITS STATEMENT OF FACTS

A. Standard of Review

While Addison recognizes that review of the trial court's entry of summary judgment is "essentially *de novo*," ITT Commercial Fin. Corp., v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (en banc), the relief Scottsdale seeks on Point One of its brief is relief from the trial court's Order deeming admitted Addison's facts, which were supported by citations to the parties' pleadings. When the non-moving party alleges procedural errors in connection with the moving party's motion for summary judgment, the trial court's

ruling on those procedural errors should be examined under an abuse of discretion standard. Rasse, 18 S.W.3d at 488. In Rasse, the non-moving party complained that the moving party's motion for summary judgment failed to comply with Mo. R. Civ. P. 74.04. Id. at 494. Specifically, the non-moving party argued that the defendant's amended motion for summary judgment did not comply with Rule 74.04 because it did not include facts upon which the motion was based. Id. The trial court held that because the motion for summary judgment was based upon a statute of limitations defense, the defendant was not required to state with particularity what elements of the petition were in dispute. Id. On appeal, the matter was reviewed on an abuse of discretion standard and the point was denied. Id. In the present case, in its Point Two, Scottsdale argues that Addison's Motion for Summary Judgment did not comply with Rule 74.04 because the statement of facts was supported by allegations in the pleadings rather than affidavits or evidence. Scottsdale's Substitute Brief at 91. Because Scottsdale's Point Two alleges that Addison's motion for summary judgment was procedurally defective, the abuse of standard discretion should apply.

B. Argument

Scottsdale maintains in its first point that the trial court erred in granting summary judgment because Addison's motion was not adequately supported by the evidence. However, the trial court did not grant summary judgment in

Addison's favor on the merits of Addison's motion. (LF 1250). The trial court found that the Scottsdale's Response to Defendants' Motion for Summary Judgment was untimely pursuant to Mo. R. Civ. P. 74.04(c)(2) and that Scottsdale had failed to admit or deny many of Addison's facts as 74.04(c)(2) requires. (LF 1251). Due to the untimeliness of Scottsdale's Response and Scottsdale's failure to comply with Rule 74.04(c)(2), the court deemed Addison's facts admitted, and granted summary judgment in Addison's favor. (LF 1251, 1386-91).

The trial court properly granted summary judgment in Addison's favor due to Scottsdale's failure to comply with Rule 74.04(c)(2). This rule states in relevant part:

> (2) *Responses to Motions for Summary Judgment*. Within 30 days after a motion for summary judgment is served, the adverse party shall serve a response on all parties. The response shall set forth each statement of fact in its original paragraph number and immediately thereunder admit or deny each of movant's factual statements.
>
> A denial may not rest upon the mere allegations or denials of the party's pleading. Rather the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.

. . .

> A response that does not comply with this Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph.

Mo. R. Civ. P. 74.04(c)(2). "The requirements of Rule 74.04(c)(2) are mandatory." Chopin v. Am. Auto. Ass'n. of Mo., 969 S.W.2d 248, 250 (Mo. App. 1998). Noncompliance with Rule 74.04 cannot be waived by the opposing party. Miller v. Ernst & Young, 892 S.W.2d 387, 389 (Mo. App. 1995). In fact, if the non-moving party fails to comply with Rule 74.04 and if the motion for summary judgment establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the trial court is required to grant the motion. Bently v. Wilson Trailer Co., 504 S.W.2d 277 (Mo. App. 1973).

In the present case, Scottsdale admitted that two elements required to prevail on the tort of bad faith failure to settle were not present. In Missouri, bad faith failure to settle is treated as a tort between the insured and the insurer. Zumwalt, 228 S.W.2d at 755. The elements of the tort of bad faith failure to settle are: (1) the liability insurer has assumed control over the negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer

acts in bad faith, rather than negligently. Dyer, 541 S.W.2d at 705; see also Shobe, 279 S.W.3d at 211. The Missouri Supreme Court has also held that an insurance company incurs liability in a bad faith claim "when the company refuses to settle a claim within the policy limits and the insured is subjected to a judgment in excess of the policy limits as a result of the company's bad faith in disregarding the interests of its insured in hopes of escaping its responsibility under the liability policy." Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 68 (Mo. 2000) (en banc). In the present case, the trial court deemed admitted that Addison had settled the wrongful death claim within the liability limits of the Addison policy at mediation, and thereby had not refused to settle the claim. (LF 1387, 1389). The court also deemed admitted that Addison's insured was never subjected to a judgment in excess of the Addison policy limits, and therefore the elements of bad faith failure to settle had not been met. (LF 1388-89). Addison, therefore, demonstrated that there was no genuine issue of material fact and that Addison was entitled to judgment as a matter of law. On the basis of that record, the trial court was required to enter summary judgment in favor of Addison under Rule 74.04(c)(2) and the mandatory nature of its requirements.

Scottsdale's filing of an untimely response on October 11, 2012 did not cure its failure to comply with Rule 74.04(c)(2) when its Response was not filed pursuant to the court's authority granting an extension of time. Rule 74.04(c)(2)

gives the trial court discretion to order the 30 day period to be enlarged. Saladin v. Jennings, 111 S.W.3d 435 (Mo. App. 2003). However, in this case, Scottsdale has admitted that it never sought an order from the court to enlarge time to respond to Addison's Motion for Summary Judgment. (LF 1252). Instead, Scottsdale obtained the consent of defense counsel for an extension, then filed "Plaintiffs' Extension to File Response to Defendants' Motion for Summary Judgment" on October 2, 2012 stating that four additional days "herewith are granted" to Scottsdale to file its Response. (LF 287). On October 5, 2012, Scottsdale filed "Plaintiffs' Further Extension To File Response to Defendants' Motion for Summary Judgment" in which Scottsdale stated, pursuant to defense counsel's consent, that an additional seven days "herewith are granted." (LF 289). Neither pleading seeks leave of court for an extension. (LF 287-90). Neither pleading take the form of a motion requesting any action from the court. (LF 287-90). In each of the aforementioned pleadings, Scottsdale grants itself the additional time to respond to Addison's Motion for Summary Judgment. (LF 287-90). Scottsdale admits that it never requested an extension of time to file their Response *from the court* prior to the hearing on its "Motion for Reconsideration" on December 4, 2012. (LF 1252; Tr. p. 4-5). Once thirty days expired without a motion from Scottsdale seeking an extension of time to file a Response, Addison's facts were deemed admitted and any later response is inadequate and fails to preserve any

dispute of material fact. Butler v. Tippee Canoe Club, 943 S.W.2d 323, 325 (Mo. App. 1997) (citing Sours v. Pierce, 908 S.W.2d 863, 865-66 (Mo. App. 1995)); see also Reese v. Ryan's Family Steakhouses, Inc., 19 S.W.3d 749, 752 (Mo. App. 2000).

In cases where a party has filed an untimely response to a motion for summary judgment, the responding party has admitted the facts alleged by the moving party. In Fowler v. Nutt, 207 S.W.3d 146 (Mo. App. 2006), a mother filed suit against the police department after her child was killed by a felon whose vehicle struck the plaintiff's child during a police pursuit. The police department filed a motion for summary judgment, accompanying memorandum, and a statement of facts attaching evidence that sirens were used during the pursuit. Id. at 147. The plaintiff never filed a response, but submitted at the motion hearing an affidavit of a witness who disputed the use of sirens by police during the chase. Id. The affidavit was submitted thirty six (36) days after the police department's motion for summary judgment was filed and, therefore, was untimely and not considered by the trial court. Id. The trial court granted the plaintiff an additional seven days to respond to the concerns regarding the timeliness and sufficiency of her response to the motion, but she maintained she had properly responded to the motion orally at the motion hearing. Id. The court granted the police department's Motion for Summary Judgment.

When Fowler appealed, the Court of Appeals held that "[t]his rule [74.04(c)(2)] clearly requires the non-movant to file a written response not more than 30 days after the motion is filed. Fowler failed to file a written response at any time – and, when the Court gave her an opportunity to explain her inadequate response and untimely affidavit, she gave no explanation other than that her oral response was satisfactory." Id. at 148. The Court held that Fowler's failure to file a timely written response failed to comply with Rule 74.04, thereby constituting an admission to the police department's statement of facts. Id. Because the statement of facts included evidence that sirens were used during the pursuit, there was nothing preserved in the record that could have allowed the trial court to find a genuine issue of material fact. Id. The trial court's judgment in favor of the police department, therefore, was affirmed. Id.

In the present case, Scottsdale failed to file a response within the time allowed under Rule 74.04(c)(2) and failed to request an extension of that deadline. Its failure to do so requires the trial court to deem the facts contained in Addison's motion to be admitted. By use of the word "shall" in Rule 74.04(c)(2), the directives of Rule 74.04(c)(2) are mandatory. Butler, 943 S.W.2d at 325. It was, thereby, mandatory that the trial court deem Addison's facts admitted. The trial court properly granted summary judgment in favor of Addison.

Scottsdale also argues that Addison did not meet its burden on its Motion for Summary Judgment because Addison's statement of facts were supported by citations to the pleadings filed by the parties. Scottsdale's Substitute Brief at 18, 91. However, Mo. R. Civ. P. 74.04(c)(1), states: "A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the *pleadings*, discovery, exhibits or affidavits that demonstrate a lack of a genuine issue as to such facts." Mo. R. Civ. P. 74.04(c)(1) (emphasis added). Reliance on the pleadings by the moving party is not only allowed by the express language of Rule 74.04(c), but Missouri courts have acknowledged that reliance on the pleadings by the moving party is authorized. Schwartz v. Lawson, 797 S.W.2d 828, 833 (Mo. App. 1990). "Our decisions, indeed, accord to summary judgment, a motion to dismiss, and a motion for judgment on the pleadings a functional equivalence. They allow a final adjudication on the pleadings alone when from the face they present no material issue of fact and the moving party is entitled to judgment as a matter of law. That role of summary judgment is made out from the provision of Rule 74.04(b) that 'a party against whom a claim . . . is asserted . . . may move with or without supporting affidavits for summary judgment. Thus, however atypical a function of Rule 74.04, and however redundant of the procedures of

Rules 55.27(a) and (b), the law remains that summary judgment may issue on the pleadings alone." Id. (citations omitted). In the present case, Addison's citations to the pleadings to support its statement of facts was authorized by Mo. R. Civ. P. 74.04(b).

This Court should deny Scottsdale's Point Two and affirm summary judgment in favor of Addison.

POINT III

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN ADDISON'S FAVOR BECAUSE THE COURT WAS DEPRIVED OF ANY AUTHORITY TO GRANT AN EXTENSION OF TIME TO RESPOND TO ADDISON'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO MO. R. CIV. P. 44.01(b) OR ANY AUTHORITY TO GRANT SCOTTSDALE RELIEF FROM THE ORDER GRANTING SUMMARY JUDGMENT PURSUANT TO MO. R. CIV. P. 74.06(b) ON THE BASIS OF EXCUSABLE NEGLECT IN THAT SCOTTSDALE NEVER SOUGHT AN ORDER FROM THE TRIAL COURT GRANTING SUCH RELIEF

A. Standard of Review

Scottsdale's third point argues that the trial court erred in granting summary judgment because the trial court had the authority to set aside its Order granting summary judgment in Addison's favor, but failed to do so. Scottsdale's Point Three maintains that the action by the trial court to be reviewed is the trial court's Judgment granting summary judgment in favor of Addison and that the review is on a *de novo* basis. However, Point Three of Scottsdale's brief seeks actually this Court's review of the trial court's ruling on Scottsdale's "Motion for Reconsideration" and not the trial court's November 1, 2012 Order granting

summary judgment or the final Judgment entered on December 4, 2012. Scottsdale has admitted that it never moved for an extension of time before its Response was due and that the first time in which an extension was requested *from the court* was during oral argument on the "Motion for Reconsideration." (Tr. p. 1-13, LF 1252-70, 1364-74). Therefore, Scottsdale never moved for extension of time before the court granted summary judgment and, therefore, there is no such ruling for this Court to review. In Point Three, Scottsdale asks this Court to find that the trial court had the discretion to grant Scottsdale an extension of time to respond to Addison's Motion for Summary Judgment in response to the "Motion for Reconsideration," but erred in not doing so. Scottsdale's Substitute Brief at 98, 100. The standard of review when considering a trial court's denial of a motion for reconsideration is an abuse of discretion. In re Carol Coe, 903 S.W.2d 916, 918 (Mo. 1995) (en banc). If reasonable people can differ about the propriety of the action taken by the trial court, the trial court did not abuse its discretion. Lowdermilk v. Vescovo Bldg. & Realty Co., Inc., 91 S.W.3d 617, 625 (Mo. App. 2002). Moreover, a trial court's decision to grant or not grant an extension of time to respond to a Motion for Summary Judgment is reviewed under an abuse of discretion standard. Southwestern Bell Yellow Pages, Inc. v. Wilkins, 920 S.W.2d 544, 551 (Mo. App. 1996). This court should apply an abuse of discretion standard to Point Three of Scottsdale's Substitute Brief.

B. Argument

Scottsdale's third point fails because it asks this Court to find that the trial court erred in not granting relief which Scottsdale never requested. As argued above, Scottsdale has admitted that it never sought an order from the court to enlarge time to respond to Addison's Motion for Summary Judgment before the hearing on the "Motion for Reconsideration." (Tr. p. 4-7, LF 1252). In fact, at that hearing on December 4, 2012, Scottsdale's counsel and Judge Ravens had this exchange:

THE COURT: When did you ask for this extension of time?

MR. YUTER: Well, I think we may have made an error in not asking for it before it was due and that would also be part of our neglect.

THE COURT: Have you ever asked for it before today?

MR. YUTER: No. We're asking it for the first time on this motion.

THE COURT: You're two months after the fact.

MR. YUTER: We filed the motion quite a while ago.

THE COURT: Motion for . . .?

MR. YUTER: The motion that we're here today to –

THE COURT: The motion here today is a motion for rehearing on a decision I made saying you were out of time. You've never asked for an extension of time until just now to file your responses out of time, have you?

MR. YUTER: That was in our moving papers.

THE COURT: Okay. That was filed about the middle of November.

(Tr. pp. 5-6). However, the "moving papers" Scottsdale's counsel referred to is their Motion for Reconsideration filed on November 14, 2012 which merely asked the trial court to "reconsider its Order of November 1, 2012." (LF 1254 ¶ 15, 1261-62). The Motion for Reconsideration did not move the court pursuant to Mo. R. Civ. P. 44.01(b) or any other authority for an order allowing more time. (LF 1252-70). No motion pursuant to Mo. R. Civ. P. 44.01(b) was ever made in this case at any time, including at the December 4, 2012 hearing on the Motion for Reconsideration. During that hearing, Scottsdale's counsel did not make an oral motion pursuant to Rule 44.01(b). Instead, he argued that relief under Rule 44.01(b) had been sought in Scottsdale's Motion for Reconsideration, when it was not. (Tr. p. 2-13, LF 1252-70). This Court should find that Judge Ravens did not

abuse his discretion in failing to grant relief pursuant to Mo. R. Civ. P. 44.01(b) when such relief was never requested.

Scottsdale similarly failed to move for relief from the judgment pursuant to Mo. R. Civ. P. 74.06(b) on the grounds of excusable neglect. Scottsdale's "Motion for Reconsideration" merely asked the court to *reconsider* its November 1, 2012 Order granting summary judgment in Addison's favor and did not move the court for relief pursuant to Mo. R. Civ. P. 74.06(b) on the grounds of excusable neglect. The "Motion for Reconsideration" never mentions the phrase "excusable neglect" or references rule 74.06(b). Scottsdale's Reply to Addison's Response to the Motion for Reconsideration states "the Court should have taken into consideration whether any neglect on plaintiffs' part was 'excusable' under Rule 74.06(b)," but the Reply does not make a motion for relief pursuant to Rule 74.06(b). (LF 1364, 1372-73). Instead, Scottsdale's conclusion in the Reply states "The Court should find that . . . any 'neglect' on plaintiffs' part was excusable," then Scottsdale suggests three "options." (LF 1372-73). None of the three options stated in the conclusion of Scottsdale's Reply ask the court to set aside the November 1, 2012 Order on the basis of "excusable neglect." (LF 1372-73). During the hearing on the "Motion for Reconsideration," Scottsdale's counsel discussed excusable neglect, but never made a formal motion for relief from the judgment pursuant Rule 74.06(b). (Tr. pp. 2-13). The trial court did not abuse its discretion in not

granting such relief. Point Three of Scottsdale's brief should be denied. Addison respectfully submits that this Court should affirm the trial court's Judgment in favor of Addison.

POINT IV

IV. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF ADDISON BECAUSE SCOTTSDALE DID NOT FILE A REQUIRED RESPONSE TO ADDISON'S MOTION FOR SUMMARY JUDGMENT IN THAT SCOTTSDALE NEVER MOVED THE COURT FOR AN EXTENSION OF TIME TO FILE THEIR RESPONSE OUT OF TIME AND SCOTTSDALE NEVER FILED A MOTION FOR RELIEF BASED ON EXCUSABLE NEGLECT

A. Standard of Review

The standard of review when considering a trial court's denial of a motion for reconsideration is an abuse of discretion. In re Carol Coe, 903 S.W.2d at 918. "If reasonable people can differ about the propriety of the action taken by the trial court, the trial court did not abuse its discretion." Lowdermilk, 91 S.W.3d at 625.

B. Argument

The Missouri rules do not recognize a motion for reconsideration." St. Louis County v. Prestige Travel, Inc., 344 S.W.3d 708, 712 (Mo. 2011) (en banc). See also Hinton v. Proctor & Schwartz, Inc., 99 S.W.3d 454, 459 (Mo. App. 2003) (citing Koerber v. Alendo Bldg. Co., 846 S.W.2d 729, 730 (Mo. App. 1992) ("Generally, a motion for reconsideration has no legal effect because no Missouri

rule provides for such a motion."). In Koerber, the court found that "[n]o Missouri Supreme Court Rule sanctions the use of a motion for reconsideration" and "[s]uch motions are mentioned in the rules only twice, and in both instances the rules provide they shall *not* be filed." Koerber, 846 S.W.2d at 730 (emphasis in original). Based on these findings, the court stated that a "motion for reconsideration [has] no legal effect as no Missouri rule provides for such a motion." Id. (citation omitted). Accordingly, Scottsdale's "Motion for Reconsideration" has no legal effect.

While Missouri Rule of Civil Procedure 44.01 does allow the Court to enlarge the time to file a response to a Motion for Summary Judgment, the court may do so "in its discretion." The Court may "(1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon notice and motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." Rule 44.01(b). Addison does not dispute that Scottsdale had the consent of defense counsel with regard to extensions. However, the Court correctly states that Scottsdale did not request such an extension from the Court before the expiration of the period originally prescribed.

Addison filed its Motion for Summary Judgment, including its Statement of Uncontroverted Material Facts and Suggestions in Support, on August 30, 2012, providing the pleadings to Scottsdale's counsel via email. Pursuant to Rule 43.01(c) and (d), service of a written motion may be made upon a party's attorney by electronic mail and service by electronic mail is complete upon transmission. Accordingly, Scottsdale had thirty (30) days to file their response to Addison's Motion for Summary Judgment under Rule 74.04. Because the thirtieth day, September 29, 2012, fell on a Saturday, pursuant to Rule 44.01(a), Scottsdale had until Monday October 1, 2012 to file their Response to Addison's Motion for Summary Judgment. Scottsdale filed "Plaintiffs' Extension to File Response to Defendants' Motion for Summary Judgment" on October 2, 2012. (LF 1280-81). Scottsdale filed "Plaintiffs Further Extension to File Response to Defendants' Motion for Summary Judgment" on October 5, 2012. (LF 1285-85). Scottsdale's Response to Addison's Motion for Summary Judgment was filed on October 11, 2012. According to the Missouri Rules of Civil Procedure, Scottsdale's Response to Addison's Motion for Summary Judgment was untimely because Scottsdale did not file its Response or request an extension from the Court by October 1, 2012.

As previously stated, it is within the court's discretion under Rule 44.01(b) to order a time period enlarged for a required act. After the expiration of the specified period, the Court may permit the act to be done upon notice and motion

where the failure to act was the result of excusable neglect. Rule 44.01(b). Scottsdale's "Motion for Reconsideration" does not explicitly request relief based on excusable neglect for their failure to file an extension before October 1. To the extent Scottsdale is relying on Addison's consent as the basis for excusable neglect, the Court was aware of such consent based on Scottsdale's untimely filed "Extension to File Response to Defendants' Motion for Summary Judgment" and "Further Extension to File Response to Defendants' Motion for Summary Judgment." (LF 1280-81, 1285-86). The trial court acted within its discretion when it did not order an enlargement of the time period for Scottsdale's Response and ordered on November 1, 2012 that Scottsdale's Response was untimely and Addison's Statement of Uncontroverted Material Facts was deemed admitted in its entirety pursuant to Rule 74.04. This Court should deny Scottsdale's Point Four and affirm summary judgment in Addison's favor.

CONCLUSION

For all the foregoing reasons, Addison and United Fire respectfully request that the Court affirm the trial court's Judgment and find that:

(1) Addison met its threshold burden in demonstrating that it was entitled to judgment as a matter of law because Scottsdale's Response to the Motion for Summary Judgment was not timely filed pursuant to Rule 74.04(c)(2), it failed to request an extension from the trial court, and Addison was justified in relying on the pleadings to support its statement of facts, and therefore, Addison's facts were deemed admitted;

(2) The trial court was deprived of authority to grant an extension of time to respond to Addison's Motion for Summary Judgment pursuant to Mo. R. Civ. P. 44.01(b) or any authority to grant Scottsdale relief from the Order granting summary judgment pursuant to Mo. R. Civ. P. 74.06(b) on the basis of excusable neglect because Scottsdale never sought an order from the trial court granting such relief;

(3) Scottsdale did not file a required response to Addison's Motion for Summary Judgment in that Scottsdale never moved the trial court for an extension of time to file its Response out of time and Scottsdale never filed a motion for relief based upon excusable neglect;

(4) Missouri law does not recognize BFFS by an excess insurance carrier against a primary insurance carrier under any legal theory;

(5) Scottsdale's decision to pay money to settle the Childress lawsuit was a voluntary payment after Addison had tendered its $1 million limit and before any excess judgment was entered against the insureds, and therefore, Scottsdale's payment cannot form the basis for a BFFS claim.

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RULE 84.06(c) CERTIFICATION

Undersigned counsel for Respondents Addison Insurance Company and United Fire & Casualty Company hereby certifies that this Respondent's Substitute Brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and (c) in that it contains 17,047 words and 1,474 lines of mono-spaced type as counted using Microsoft Word 2007 and complies with Rule 84.06(g) in that the CD-Rom provided to the Court containing this Respondent's Substitute Brief has been scanned for viruses and that it is virus-free and has been formatted in Microsoft Word 2007.

Dated: April 10, 2014

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CERTIFICATE OF SERVICE

I hereby certify that the Respondents' Substitute Brief has been filed and placed electronically with the Supreme Court of Missouri and placed for delivery through the Missouri e-Filing System on this 10th day of April, 2014, to the following:

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